

# HOGAN & HARTSON

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September 17, 2004

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: WT Docket No. 03-103**  
***Ex Parte* Submission Regarding the**  
**Need for Bidding Credits in Any Auction of ATG**  
**Spectrum**

Dear Ms. Dortch:

AirCell, Inc. ("AirCell") submits these *ex parte* comments in the above-referenced docket to emphasize the importance of including bidding credits for small businesses, consistent with the goals of the Communications Act<sup>1</sup> and with prior Commission precedent, in the event the Commission decides to auction the spectrum in the air-to-ground ("ATG") band.

As the Commission has established, bidding credits are specifically authorized by the Communications Act and are useful "to promote economic opportunity and to counterbalance the tendency of auctions to concentrate license ownership in the hands of several large companies."<sup>2</sup> The Commission routinely

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<sup>1</sup> Section 309(j)(3)(B) establishes an objective of ensuring the dissemination of licenses among a wide variety of applicants, including small businesses.

<sup>2</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532 (1994) at ¶ 15 (bidding credits adopted "to assist designated entities without large investors to overcome the additional hurdle presented by auctions").

Marlene H. Dortch  
September 17, 2004  
Page 2

provides for bidding credits in developing rules for the auction of new spectrum licenses, including for nationwide licenses.<sup>3</sup>

AirCell believes that, for the ATG band, it would be appropriate to adopt the schedule of bidding credits contained in Part 1 of the rules – at a minimum – as the Commission did for the recent auction of the nationwide 5 MHz license in the 1670-1675 MHz band. Specifically, the Commission provided a 15% bidding credit for designated entities with \$40 million or less in gross annual revenue, and a 25% bidding credit for designated entities with \$15 million or less in gross annual revenue.<sup>4</sup>

As the Commission is well aware, AirCell has demonstrated its ability to design, deploy and operate a nationwide air-ground network. Nevertheless, AirCell is still a “small business” and would qualify as a designated entity under the Commission’s rules. Indeed, AirCell is precisely the type of small business that bidding credits were designed to assist – *i.e.*, businesses that have the resources and expertise to build a network and provide a service to the public, but which could potentially be foreclosed from the market by large, well-financed competitors with the financial wherewithal to bid up spectrum out of the reach of any small businesses.<sup>5</sup> The FCC may want to consider the possibility of including higher bidding credit levels for an ATG auction, give the diverse variety of the current proponents and parties interested in this spectrum.

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<sup>3</sup> See *Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, Third Report and Order, 12 FCC Rcd 10943 (1997) (“220 MHz Auction Order”); *Amendments to Parts 1, 2, 27 and 90 of the Commission’s Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz and 2385-2390 MHz Government Transfer Bands*, Report and Order, 17 FCC Rcd 9980 (2002) (“1670-1675 MHz Auction Order”).

<sup>4</sup> 1670-1675 MHz Auction Order at ¶ 108 (citing 47 C.F.R. § 1.2110(f)(2)).

<sup>5</sup> See *id.* (“bidding preferences for qualifying bidders provide such bidders with an opportunity to compete successfully against large, well-financed entities”).

Marlene H. Dortch  
September 17, 2004  
Page 3

Therefore, the Commission should not deviate from its precedent of providing for designated entity bidding credits if it drafts competitive bidding rules for the ATG band.

Respectfully submitted,

*/s/ Michele C. Farquhar*

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Counsel to AirCell, Inc.

Attachment

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